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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JERMONE THYMES,

Defendant and Appellant.

B208211

(Los Angeles County
Super. Ct. No. BA320457)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Curtis B. Rappe, Judge. Affirmed.

Linda Acaldo, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Jermone Thymes of conspiracy to commit grand theft (Pen. Code, § 182, subd. (a)(1)), and grand theft (§ 487, subd. (a)).¹ Appellant contends the trial court committed reversible error by: (1) instructing the jury on CALCRIM Nos. 223, 226, and 302, which individually and collectively lessened the prosecution's burden of proving appellant's guilt beyond a reasonable doubt; and (2) denying a juror's request to be excused from deliberations. Finding no merit to appellant's contentions, we affirm the judgment.

BACKGROUND²

The Supplemental Security Income (SSI) program is a federal and state funded cash-based assistance program for individuals who meet certain income restrictions and are disabled, legally blind, or 65 years of age or older. If a person receives SSI funds, he must report any income he earns to the Social Security Administration (SSA), the agency that administers SSI funds, so that the SSA may determine whether that person remains eligible for SSI funds, and if so, the amount to which he is entitled.

When a recipient of SSI funds is unable to care for his own affairs, including his finances, another person will serve as the recipient's "representative payee." The representative payee handles the recipient's affairs and finances, and acts as the liaison between the SSA and the recipient. When a person becomes a representative payee, she certifies that she will use all SSI funds given to her for the care and upkeep of the recipient. The SSA encourages the representative payee and the recipient to obtain a joint bank account so that both parties may access the SSI funds easily.

¹ All subsequent statutory references are to the Penal Code unless otherwise indicated.

² The underlying proceedings involved four defendants and a 30-count grand jury indictment. The record from the multiday jury trial is substantial. This decision cites only those facts necessary to understand properly the issues raised on appeal.

In March 1993, John Thymes began receiving SSI funds for his claimed disability of having “mood disorders.”³ Appellant, John’s daughter, served as John’s “representative payee.” Appellant and John had a joint bank account into which the SSA deposited John’s monthly SSI funds. During the relevant time frame, John was receiving \$340 per month in SSI funds.

Sometime in 2004, Maria Reyes, an operations supervisor for the SSA Inglewood branch, received information from another SSA branch that John had been paid \$1,607.90 for representing a third party before the Social Security Administration Board (SSA Board) in an unrelated dispute, and had received \$1,155 in winnings from the Churchill Downs Fall Operating Company. Because neither appellant nor John reported these earnings to the SSA, Reyes sent appellant a letter informing her of the SSA’s knowledge of the earnings and requesting that appellant and John report to the SSA for an interview. Reyes testified that it was necessary to ascertain John’s true income in order to determine whether the SSA should reduce his monthly SSI payments, or eliminate them altogether.

In August 2004, Reyes received a letter from appellant stating that John had received only \$20 in winnings, and not \$1,155. As it turns out, under SSA regulations, recipients of SSI funds need not report winnings of \$20 or less. Additionally, appellant filled out a “redetermination” of SSI eligibility form wherein she represented, under penalty of perjury, that John met the mandatory minimum income requirements to collect SSI funds.

On October 20, 2004, Reyes met with appellant and John at the branch office. Reyes asked John a number of questions, including his name at birth, place of birth, parent’s names, past and present addresses, the name of his landlord, and sources of income. John answered each question capably and with no hesitation. When Reyes

³ Because appellant and John Thymes share the same last name, we will hereinafter refer to John Thymes as “John.”

began questioning John about whether he was paid to represent third parties in disputes before the SSA Board, he “totally shut down” and refused to answer her questions. Appellant claimed that John could not answer these questions because he was “medicated.” This struck Reyes as disingenuous because John had no difficulty answering her previous questions and only became unresponsive after she began questioning him about sources of undeclared income.

At the conclusion of the interview, Reyes determined that John was fully capable of handling his own affairs and concluded that his additional earnings should result in a reduction of his SSI benefits. She referred the matter to the SSA’s Office of Internal General. That office conducted a fraud investigation and ultimately suspended John’s SSI benefits altogether in 2006. From March 1, 1993 until June 1, 2006, while appellant was John’s representative payee, John received \$90,230.74 in SSI benefits.

During the time period when John was receiving SSI funds, he was also using a false identity in the name of “John Decaen.” Through the alias of “John Decaen,” John masqueraded as a caretaker for an elderly and/or disabled person who required in-home support services. By masquerading as a caretaker, John received approximately \$2,100 a month for providing in-home support services, services which he never performed.⁴ John did not declare these ill-begotten funds to the SSA. Had he done so, the SSA calculated that it would have reduced his SSI payments by approximately \$45,000 during the relevant time period. There was evidence at trial from which the jury could infer that appellant was aware of John’s use of a false identity to obtain IHSS funds fraudulently.

The jury convicted appellant of conspiracy to commit grand theft and grand theft. The trial court imposed a sentence of two years (the midterm) for the conspiracy count, and eight months (the midterm) for the grand theft count, for a total of two years and

⁴ The county’s Department of Public Social Services administers the In-Home Supportive Services (IHSS) program, which pays caretakers to provide assistance to the elderly, blind, or disabled so that these individuals may remain at home, instead of in a convalescent or residential facility.

eight months in state prison. The trial court awarded appellant 627 days for time served. Appellant timely appealed from the judgment.

DISCUSSION

I. Alleged Instructional Error

A. Appellant's Contention

Appellant contends that the CALCRIM instructions Nos. 223, 226, and 302 impermissibly lessened the prosecution's burden of proof and therefore, reversal is required.⁵

B. Relevant Authority

"In assessing a claim of instructional error, 'we must view a challenged portion "in the context of the instructions as a whole and the trial record" to determine "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution.'"" (*Jablonski, supra*, 37 Cal.4th at p. 831; see also *Estelle v. McGuire* (1991) 502 U.S. 62, 72.) In doing so, we must ""assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.'"" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148–1149.) "We can, of course, do nothing else. The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions." (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.)

⁵ In her opening brief, appellant contends that there are two separate and distinct grounds for challenging CALCRIM Nos. 223, 226, and 302. First, they are "clearly erroneous" and second, they are "ambiguous." But appellant fails to explain how in this context, that distinction matters or even makes sense. The overall thrust of appellant's challenge to these instructions is that the jury applied the instructions in a way that reduced the prosecution's burden of proving her guilt beyond a reasonable doubt. Whether one refers to the instructions as "clearly erroneous" or "ambiguous" is beside the point. The inquiry is whether "'there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*People v. Jablonski* (2006) 37 Cal.4th 774, 831 (*Jablonski*).)

Failure to object to instructional error waives the objection on appeal unless the defendant's substantial rights are affected. (§ 1259; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192–1193.) “[S]ubstantial rights” are equated with error resulting in a miscarriage of justice under *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Arredondo* (1975) 52 Cal.App.3d 973, 978.)

Appellant did not object to the challenged instructions at the trial. Assuming, without deciding, that the challenged instructions affect appellant's substantial rights, we turn to the merits of her claims on appeal.

C. Analysis of CALCRIM Instruction No. 223

CALCRIM No. 223, which defines direct and circumstantial evidence, as given in this case, states in relevant part:

“Facts may be proved by direct or circumstantial evidence or by a combination of both. Direct evidence can prove a fact by itself. . . . Circumstantial evidence also may be called indirect evidence. Circumstantial evidence does not directly prove the fact to be decided, but is evidence of another fact or group of facts from which you may logically and reasonably conclude the truth of the fact in question. . . . Both direct and circumstantial evidence are acceptable types of evidence *to prove or disprove the elements of a charge*, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact in issue has been proved based on all the evidence.” (Italics added.)

Appellant contends that the italicized portion of CALCRIM No. 223 “tells the jury that the defense has a duty to present evidence to disprove the charge,” thereby reducing the prosecution's burden of proving her guilt beyond a reasonable doubt.

Undoubtedly, the prosecution bears the burden of proving every element of an offense beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.) A jury instruction that lessens the prosecution's burden in this respect deprives the defendant of due process and is unconstitutional. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 520.)

We are satisfied that CALCRIM No. 223 does not reduce the prosecution's burden of proof.

The instruction states that either direct or circumstantial evidence may prove or disprove the elements of a charge. Certainly, if a defendant chooses to offer evidence, that evidence may be either direct or circumstantial, and neither type of evidence is necessarily more reliable than the other. The instruction does not state, nor does it imply, that a defendant has the burden to disprove an element of a charge against him to obtain an acquittal. Read as a whole, and especially in conjunction with CALCRIM No. 220, which the trial court also read to the jury, there was no reasonable likelihood that the jury misinterpreted CALCRIM No. 223 as requiring appellant to disprove an element of the charges against him.⁶

D. Analysis of CALCRIM Instruction No. 226

CALCRIM No. 226, the instruction that provides guidance for assessing witness credibility, as given in this case, states in relevant part:

“You alone, must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. [You must judge the testimony of each witness by the same standard.] You must set aside any bias or prejudice you may have, including any based on the witness's disability, gender, race, religion, ethnicity, sexual orientation, gender identity, age, national origin In evaluating a witness's testimony, you may consider anything that reasonably tends *to prove or disprove the truth or accuracy of that testimony*. Among the factors that you may consider are: How well could the witness see, hear, or otherwise perceive the things about which the witness testified? How well was the witness able to

⁶ As read to the jury, CALCRIM No. 220 provided in relevant part: “A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. . . . Unless the evidence proves the defendants guilty beyond a reasonable doubt, they are entitled to an acquittal and you must find them not guilty.”

remember and describe what happened? What was the witness's behavior while testifying? Did the witness understand the questions and answer them directly? Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided? What was the witness's attitude about the case or about testifying? Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony? Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember." (Italics added.)

Appellant focuses on the italicized language above and argues "like CALCRIM [No.] 223, CALCRIM [No.] 226 insinuates to the jury that appellant was required to disprove some element of the offense with which he was charged."

CALCRIM No. 226 provides jurors with a number of factors to consider when assessing a witness's credibility and informs them that they should not automatically reject a witness's testimony simply because of inconsistencies or conflicts. The instruction is based on Evidence Code section 780, which enumerates similar factors in assessing witness credibility. (Evid. Code, § 780; see also *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883–884 [court has sua sponte duty to instruct on factors affecting witness's credibility].) It is clear that these factors, and not the italicized language, are the focus of the overall instruction. We conclude there was no reasonable likelihood that the jury misinterpreted CALCRIM No. 223 as requiring appellant to disprove an element of the charges against him.

E. Analysis of CALCRIM Instruction No. 302

CALCRIM No. 302, the instruction that provides guidance for evaluating conflicting evidence, as given in this case, states in relevant part:

"If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the

other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point.”

Appellant challenges CALCRIM No. 302 in several respects:

First, appellant contends that the instruction “creates a presumption that all witnesses are deemed to be truthful, unless a juror has some reason to conclude otherwise[,]” which effectively “require[s] the jurors to accept the prosecution witnesses testimony unless a criminal defendant disproves the testimony.” As appellant acknowledges, this precise challenge to CALCRIM No. 302 has been squarely rejected by *People v. Anderson* (2007) 152 Cal.App.4th 919, 938–940 and *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1191–1192. We find the reasoning in those cases persuasive. The instruction does not instruct the jury to presume that a witness is truthful. Rather, it directs the jury not to disregard a witness’s testimony without reason or simply to favor one side over another. Thus, CALCRIM No. 302 is akin to CALJIC No. 2.22, an instruction which cautions jurors not to disregard a witness’s testimony “merely from caprice, whim or prejudice” and was approved of by the Supreme Court in *People v. Rincon-Pineda, supra*, 14 Cal.3d at pages 884 to 885.

Second, appellant contends the instruction “directs the jury to choose between the government’s witnesses and the defense witnesses” and “states that the number of witnesses is one factor (although not necessarily the determinative factor) for the jury to consider when deciding which of two conflicting versions of the facts to accept.” Appellant misreads the instruction. “The instruction says nothing about choosing between prosecution and defense witnesses. It merely states the common sense notion that the number of witnesses who have given testimony on a particular point is not the test for the truth of that point. It does no more. The jury remains free to choose the witness or witnesses it believes and what part of a witness’s testimony it finds believable.” (*People v. Anderson, supra*, 152 Cal.App.4th at p. 940.)

Third, appellant contends the instruction “requires a jury to ‘believe’ defense evidence in order to acquit a criminal defendant,” which effectively requires the defense to put forth some evidence in support of acquittal. There is nothing in the language of CALCRIM No. 302 to support such a strained interpretation. The instruction explains to the jury that if there is a conflict in the evidence, the jury can choose to believe some of the evidence presented or none at all. It says and implies nothing about the defendant’s burden at trial.

In sum, we conclude there is no reasonable likelihood that the jury misinterpreted CALCRIM No. 302 in the ways urged by appellant. We also conclude that there is no reasonable likelihood that the jury collectively misinterpreted CALCRIM Nos. 223, 226, and 302 in a way that reduced the prosecution’s burden.

II. Failure to Discharge Juror

A. Appellant’s Contention

Appellant contends the trial court abused its discretion by failing to discharge a juror who informed the court, in the middle of deliberations, that he no longer wanted to be on the jury because he was concerned that his employer would not continue to pay him and that he was falling behind on a project at work.

B. Summary of Proceedings Below

On the third day of deliberations, Juror No. 5 sent the trial court a note explaining that he was on his 14th day of jury service and his employer had agreed to pay for 15 days of jury service.⁷ When the trial court interviewed the juror and asked him whether it would be hardship for him to continue serving without receiving pay, the juror did not answer the question and instead responded: “I would have to let them know what is the situation because of those days we missed. It’s been quite a long time.” The trial

⁷ We do not know whether the juror in question is a man or a woman. We use the pronoun “he” instead of the gender neutral “he/she” for brevity.

court offered to prepare a letter for Juror No. 5's employer explaining the necessity of the juror's presence for deliberations. The juror responded: "Okay."

On the fourth day of deliberations, Juror No. 5 explained to the trial court that he believed deliberations would continue for another week, and he no longer wanted to serve as a juror because his employer would not pay for additional time and he worried about falling further behind on a work project. The trial court explained to Juror No. 5 that many jurors receive no pay at all during their service "[a]nd the rule of thumb is that if the case isn't going to go beyond five to seven days, we're not going to excuse a juror for hardship." The trial court pointed out that Juror No. 5 had already received pay for 15 days and if he did not receive pay for another week, it would not be hardship under the rule of thumb cited above. Juror No. 5 did not protest, and instead said "I follow [your reasoning]." The trial court went on to suggest that if Juror No. 5 so desired, the trial court would speak to his employer to explain the importance of Juror No. 5's continued service. The prosecution and the defense found the trial court's suggestion agreeable, and neither side requested that the court discharge the juror. The following exchange then occurred:

"Juror No. 5: I just wanted to voice my opinion to the point that where I feel like personally I can't really concentrate due to these circumstances and—and I'm not contributing as much as I possibly can.

"The Court: As I say, let's go on and—you talk to the supervisor and have your supervisor talk to me if necessary; okay?

"Juror No. 5: Okay.

"The Court: So I am going to deny the request at this point.

"Juror No. 5: Okay.

"The Court: I have the letter, though. If you want to take that and pass it on to the supervisor when you talk to him; okay?

"Juror No. 5: All right."

After Juror No. 5 returned to the jury room, the trial court indicated on the record that he found the juror's reasons for wanting off the jury circumspect: "My concern would be—I think he's trying to talk himself into a way off the jury. That's my analysis."

The jury found appellant guilty of conspiracy to commit grand theft and grand theft on the fifth day of deliberations.

C. Relevant Authority

"A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. [Citations.] A defendant is 'entitled to be tried by 12, not 11, impartial and unprejudiced jurors. "Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced." [Citations.]' [Citations.]" (*People v. Nesler* (1997) 16 Cal.4th 561, 578.)

As relevant here, a trial court may discharge a juror for "good cause" at any time if the juror "is found to be unable to perform his or her duty." (§ 1089.) A juror who refuses to abide by the court's instructions is unable to perform his or her duty within the meaning of section 1089. (*People v. Wilson* (2008) 43 Cal.4th 1, 25; *People v. Williams* (2001) 25 Cal.4th 441, 448.) Likewise, a juror who refuses to engage in the deliberative process is unable to perform his or her duty within the meaning of section 1089. (*People v. Engelman* (2002) 28 Cal.4th 436, 442.)

"Before an appellate court will find error in failing to excuse a seated juror, the juror's inability to perform a juror's functions must be shown by the record to be a "demonstrable reality." The court will not presume bias, and will uphold the trial court's exercise of discretion on whether a seated juror should be discharged for good cause under section 1089 if supported by substantial evidence. [Citation.]'" (*Jablonski, supra*, 37 Cal.4th at p. 807.) To determine whether a trial court has acted within its discretion in retaining or discharging a juror, "we consider not just the evidence itself, but also the

record of reasons the court provided.” (*People v. Wilson, supra*, 43 Cal.4th at p. 26.) “In doing so, we will not reweigh the evidence.” (*Ibid.*)

A defendant who fails to object to the trial court’s decision to retain or discharge a juror forfeits his claim error. (*People v. Wilson, supra*, 43 Cal.4th at p. 25.)

D. Analysis

Because appellant did not object to the trial court’s decision to retain Juror No. 5, or move for a mistrial, she has forfeited her claim of error on appeal. (*People v. Wilson, supra*, 43 Cal.4th at p. 25.)

Considering the matter on the merits, we conclude that the record before us does not show a “demonstrable reality” that Juror No. 5 was unable to fulfill his functions as a juror. (*Jablonski, supra*, 37 Cal.4th at p. 807.) Although the juror stated that his anxiety over serving beyond 15 days had some effect on his concentration and contribution during the deliberation process, he did not say that he was *unable* to concentrate, or that he could not participate in the deliberative process altogether. (Accord, *Mitchell v. Superior Court* (1984) 155 Cal.App.3d 624, 628 [affirming trial court’s discharge of juror after juror stated that he “unequivocally” could not concentrate on evidence].) Moreover, even though the juror expressed concern about his absence from work, the record does not show a demonstrable reality that his work situation was so dire as to affect his ability to deliberate. The juror had already received pay for 15 days of service and he seemed satisfied when the trial court offered to speak with his employer if necessary. (Accord, *People v. Turner* (1994) 8 Cal.4th 137, 203–205 [not an abuse of discretion to retain juror whose pay situation did not affect the juror’s ability to be fair and impartial].) We are satisfied that the trial court acted within its broad discretion by retaining Juror No. 5.

DISPOSITION

The judgment is affirmed.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST